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ARBITRATION UPDATE: WCCAS – November 3, 2018

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Overview

- This past year has seen many new cases as well as reforms to B.C.'s *International Commercial Arbitration Act*
- Today's presentation groups the cases by theme:
  - advantages of being able to characterize a process as arbitration rather than expert determination
  - drafting of contracts containing arbitration (and other) clauses
  - application of international vs. non-international arbitration statutes
  - commencing arbitration
  - stays of proceedings
  - reasonable apprehension of bias
  - evidence and thresholds on challenges regarding impartiality and jurisdiction
  - consolidation
  - issues related to leave to appeal and appeal in the domestic context

A reminder of why it's important to be able to characterize dispute resolution as arbitration

Applied Industrial Technologies, LP v. Sirois, 2018 ABQB 818:

- "Unless otherwise agreed by contract (express or implied), in an expert determination there are no fixed or default procedures for the determination; no jurisdiction in the decision maker to determine his own jurisdiction; ... no requirement on the expert to give reasons..."

- In the case of expert determination as opposed to arbitration, unless otherwise agreed by contract there is "the potential for greater limitations on jurisdiction to decide questions of law or mixed law and fact".

So in their contract the parties have included a clause that talks about arbitration ...

- But what if they have included other wording undermining that?
  - Often courts interpret clauses addressing court jurisdiction or service on "defendants" as compatible with arbitration, with the aberrant clause interpreted as simply addressing service / interim measures / challenges / enforcement: see *Trade Finance Solutions Inc. v. Equinox Global Limited,* 2018 ONCA 12
  - But this only goes so far. The court saw no clear intent to arbitrate in a contract that also said it "shall be governed by and construed in accordance with the laws of Ontario, Canada and each party hereby submits to the exclusive jurisdiction of the courts of Ontario" or in one that said "[a]ny party bringing an action or proceeding against any other party arising out of or relating to this Agreement...shall bring the action or proceeding before a justice of the Ontario Superior Court of Justice": *Graves v. Correactology Health Care Group Inc.*, 2018 ONSC 4263

So in their contract the parties have included a clause that talks about arbitration ... (cont'd)

- But what if the clause doesn't say that the parties "must" arbitrate?
  - There may still be an enforceable arbitration clause: "the Model Law may apply to an arbitration agreement even if the right of arbitration is purely optional. If the parties agree that arbitration is an optional method of dispute resolution, and one of the parties chooses to commence arbitration, there is no reason why art. 8 of the Model Law should not apply to stay any duplicative court actions in Ontario": *Trade Finance Solutions Inc. v. Equinox Global Limited,* 2018 ONCA 12

So in their contract the parties have included a clause that talks about arbitration ... (cont'd)

- But what if the subject matter gives rise to a statutory remedy that in the given statute is described as being awarded by a defined court?
  - The Ontario Superior Court of Justice has rejected a submission that as Parliament had provided for a statutory oppression remedy it must have intended that any oppression claims would be heard in court rather than arbitrated. The court held that "there is no necessary connection between the existence of a statutory remedy and the proper tribunal for the resolution of any claims asserted in respect of that remedy. In particular, the law is now well established that parties can agree to adjudicate oppression claims by way of arbitration": *The Campaign for the Inclusion of People who are Deaf and Hard of Hearing v. Canadian Hearing Society*, 2018 ONSC 5445

So you have an arbitration clause ... What statute governs the arbitration?

- Parties ***may*** be able to contract out of the domestic statute and into the international by "indicat[ing] that the subject matter of the arbitration relates to more than one country, or that arbitration proceedings are to be conducted under the *International Act*, or that [they] agree the *Domestic Act* has no application": ***Alberta Motor Association Insurance Company v. Aspen Insurance UK Limited***, 2018 ABQB 207
- BUT they may not be able to contract out of (or waive or estop themselves out of) the international arbitration statute and into the domestic, including into its broader rights to challenge an award: *McHenry Software Inc. v. ARAS 360 Incorporated*, 2018 BCSC 586

So you have an arbitration clause ... How do you commence the arbitration?

Inter Pipeline Ltd. v. Rural Road Construction Ltd., 2017 ABQB 811:

- Entry of the parties into an arbitration agreement "to address a specific known dispute that has already materialized" (as opposed to "setting out a provision in an arbitration agreement of how the parties will proceed if some future claim is subsequently identified") is sufficient to commence an arbitration under s. 23 of Alberta's *Arbitration Act,* at least where the agreement "specifies the nature of the dispute and the issues to be determined in the arbitration".

Court involvement in initiating arbitration

Lopatowski v. Lopatowski, 2018 ONSC 824:

- The Ontario Superior Court of Justice "does not have jurisdiction, in the absence of consent, to confer decision-making power on an arbitrator or another third party".

- However, there is "no impediment" where the parties consent to incorporating in an order "a requirement that the parties arbitrate disputes."

So you have an arbitration clause ... When is it too late to seek to stay court proceedings?

- In B.C.'s *Arbitration Act*, the stay application must be made "before filing a response to civil claim...or taking any other step in the proceedings".
- No step yet taken and still permissible to apply for a stay:
  - after sending a letter "identify[ing] deficiencies in the plaintiff's list of documents and comment[ing] that the list would certainly have to be amended" but "not request[ing] or requir[ing] the plaintiff to amend its list of documents or serve an amended list of documents": *Pixhug Media Inc. v. Steeves*, 2017 BCSC 2171 (decided under *ICAA* when still worded similarly to *AA*)
  - after applying to cross-examine an expert whose report was filed in support of the plaintiff's application for the *Mareva* injunction, to set aside the *Mareva* injunction and for costs of the "set-aside" hearing: ***Pixhug**, supra*

When is it too late to seek to stay court proceedings? (cont'd)

- Step has been taken and *not* permissible to apply for a stay:
  - after applying for security for costs (even though at the hearing of the application the defendants tried to limit the application to costs of their application to set aside the *Mareva* injunction that had been made against them and their intended application for a stay of proceedings in favour of arbitration): ***Pixhug**, supra*
  - after applying for damages to be assessed flowing from the grant of a *Mareva* injunction against the defendants, or alternatively for the posting of an amount as security for damages: ***Pixhug**, supra*

Evidence on stay applications

- Text of pleadings and referenced shareholders agreement (with an alleged arbitration clause) said to be sufficient in "straightforward case": *Greata Energy Inc. v. Veresen Energy Infrastructure Inc.*, 2018 ONSC 2826 (master)
- But contrast that to court's criticism of "woefully inadequate" evidence in the older *Vujcuf v. Arista Homes* (2010), 98 C.L.R. (3d) 153 (Ont. S.C.J.). The court's concern there was heightened by the fact the plaintiff was not represented and the court believed the defendant's counsel was not sufficiently forthcoming even about the statutory framework for a stay.

Denying stays of proceedings though statutory threshold met

- Controversy continues with respect to statutory provisions that say "[t]he court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that, (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and (b) it is reasonable to separate the matters dealt with in the agreement from the other matters"

  (as in Alberta and Ontario – s. 7(5) of their respective *Arbitration Acts* – but not in B.C.)

Denying stays of proceedings though statutory threshold met (cont'd)

- Does this wording allow a court to deny a stay entirely?
  - The Ontario Superior Court of Justice refused to stay a counterclaim that it agreed "[fell] squarely within the jurisdiction of an arbitrator" where both the counterclaim and the statement of claim "arise from the same factual matrix and cannot be reasonabl[y] parsed out": *Greata Energy, supra*
  - The Alberta Court of Queen's Bench has noted again this year the "difference of opinion regarding the scope of section 7(5)" of its *Arbitration Act* and again remarked that "[t]here is nothing in the wording of s 7(5) that suggests a court is given discretion to ignore the arbitration clause and permit litigation in the courts of the whole action": *Macdonald v. Burke*, 2018 ABQB 534
  - SCC hearing in *TELUS Communications Inc. v. Wellman* (on appeal from the Ontario Court of Appeal) is scheduled for November 6, 2018

Reasonable apprehension of bias in the arbitral context

- Some recent statements of general principles:
  - "The parties who engage an arbitrator to decide their disputes do so on the basis that the decision maker will be fair and impartial": *Tanzanian Goldfields Company Limited v. East Africa Metals Inc.*, 2018 BCSC 1511
  - An "arbitrator" even where appointed by a party as part of an eventual three-person panel is required to act independently and impartially: *Hunt v. The Owners, Strata Plan LMS 2556*, 2018 BCCA 159
  - "[O]nce there is a reasonable appearance of bias, it is unnecessary to embark on the impossible task of determining the actual state of mind of the decision-maker": *Hunt, supra*

Reasonable apprehension of bias in the arbitral context (cont'd)

- When is there a reasonable apprehension of bias?
  - *Ex parte* communications between an arbitral tribunal and a lawyer for one of the parties may give rise to a reasonable apprehension of bias even where the contact is not on the substance of the dispute or the evidence: ***Hunt****, supra*
  - By contrast, "[a]n informed person viewing the matter realistically and practically – and having thought the matter through – could not possibly conclude that an arbitrator is biased simply because he or she rules on a disputed matter against one party, even if that occurs on more than one [occasion]." In this regard, "[r]uling on a disputed issue is the essence of the arbitrator's role" and if a party believed the awards were wrongly decided, that party's "legal remedy was to appeal those decisions": *La Fontaine v. Maxwell*, 2018 ONSC 5123; *Driscoll v. Hautz*, 2018 ABCA 272

Challenging an arbitrator regarding independence and impartiality

- Section 12(3.1) of B.C.'s amended *International Commercial Arbitration Act* provides that "[f]or the purposes of subsection (3)(a) [challenging an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's independence or impartiality], there are justifiable doubts as to the arbitrator's independence or impartiality only if there is a real danger of bias on the part of the arbitrator in conducting the arbitration."
- This proviso does not limit arbitrators' disclosure obligations in s. 12(1) or (2) of the *International Commercial Arbitration Act*, where "justifiable doubts" are referred to without the challenge-related threshold.

Evidence filed on reasonable apprehension of bias / jurisdictional court challenges

- On a challenge to the arbitrator under ss. 12-13 of the *International Commercial Arbitration Act*, the B.C. Supreme Court was not limited to evidence filed with the arbitrator on the request that the arbitrator recuse himself: *Tanzanian Goldfields Company Limited v. East Africa Metals Inc.*, 2018 BCSC 1511
- Also, neither Art. 16(3) (preliminary jurisdictional question) nor Art. 34(2) (setting aside for lack of jurisdiction) of the Model Law "can be construed as constraining the court to the four corners of the evidentiary record before the tribunal": *The Russian Federation v. Luxtona Limited,* 2018 ONSC 2419

Threshold for natural justice challenges

- In 2018, B.C.'s *International Commercial Arbitration Act* was amended to provide that each party "must be given a reasonable opportunity to present their case" rather than a "full" opportunity.
- The Attorney General said in the Legislative Assembly at the committee stage: "part of the mischief that is sought to be addressed here is the idea that someone might challenge an award and create a delay in proceedings because they hadn't had a full opportunity. It was thought that the word 'reasonable' might better reflect the intention of the drafters."

Consolidation

- The Alberta Court of Queen's Bench has held that it has "the jurisdiction to consolidate a domestic and an international arbitration pursuant to section 8(1) of [Alberta's *International Commercial Arbitration Act*]": ***Japan Canada Oil Sands Limited v. Toyo Engineering Canada Ltd.***, 2018 ABQB 844
- Can arbitrations be consolidated under the *International Commercial Arbitration Act* without all parties' consent?
  - Yes: ***Japan Canada Oil Sands****, supra*, following *Pricaspian Development Corporation v BG International Ltd*, 2016 ABQB 611
  - No: ***Alberta Motor Association Insurance Company v. Aspen Insurance UK Limited***, 2018 ABQB 207, stating that in international arbitrations "the consent of the parties is a pre-requisite to consolidation"

Parties cannot invent new mechanisms to appeal to court

- "There is no common law right of appeal" and there is no "inherent right deriving from [superior courts] having some 'inherent right over questions of law'....A right to appeal must be granted by statute": *ENMAX Energy Corporation v. TransAlta Generation Partnership*, 2018 ABQB 142
- The Alberta Court of Appeal did not have jurisdiction to hear an appeal directly from an arbitral award simply because the Alberta Court of Queen's Bench had enforced the award; the Court of Appeal could hear the matter only after the Court of Queen's Bench had heard and decided the appeal: *Anand v. Anand*, 2018 ABCA 259 (Chambers)

Contracting *out* of appeal rights?

- Some provinces (*e.g.*, Ontario) do not prohibit parties from contracting out of the ability to seek *leave to appeal* from arbitral awards on a question of law (where that ability otherwise exists, in domestic legislation).
- Other provinces (*e.g.*, Alberta) do prohibit parties from contracting out of the section providing for leave to appeal, but this prohibition does not bar an *enactment* (*e.g.*, a power purchase agreement in Alberta) from excluding the ability to seek leave to appeal: *ENMAX Energy Corporation v. TransAlta Generation Partnership*, 2018 ABQB 142, citing s. 2(2) of Alberta's *Arbitration Act* ("[i]f there is a conflict between this Act and the other enactment that authorized or required the arbitration, the other enactment prevails")

Whether leave to appeal from an arbitral award should be granted

- Questions on which leave is sought must be set out precisely: it is "not enough" for an applicant "to merely suggest or imply that the arbitrator failed entirely to apply the principles of contractual interpretation", especially as "the circumstances in which a question of law can be extricated from the contractual interpretation process will be rare": *Conmac Enterprises Ltd. v. 0928818 B.C. Ltd.*, 2018 BCSC 360
- Concerns about access to the courts expressed by the SCC in *Hryniak v. Mauldin* (not an arbitration case) do not change the considerations established by the *Arbitration Act* for considering whether to grant leave to appeal: *KBR Industrial Canada Co. v. Air Liquide Global E&C Solutions Canada LP*, 2018 ABQB 257

Whether leave to appeal from an arbitral award should be granted (cont'd)

- In *SG Ceresco Inc. v. Broadgrain Commodities Inc.*, 2018 MBQB 120, the Manitoba Court of Queen's Bench was at the very least skeptical that the following could be considered in exercising its discretion against granting leave to appeal:
  - the fact that "there ha[d] already been one level of appeal" (to a tribunal provided for under the applicable arbitration rules)
  - competing demands on court resources (*e.g.*, criminal and child protection matters): the court noted that it "schedules the hearing of civil matters within a framework that serves other types of matters also. The perceived priority of other matters is not a valid reason to reject an application for leave to appeal of an arbitral award."

Appeals from court decisions about arbitration-related issues

- The *Teal* framework does not govern appeals from one level of court to another – the Court of Appeal's jurisdiction and standard of review are different: *Atlantic Industries Limited v. SNC-Lavalin Constructors (Pacific) Inc.*, 2017 BCCA 433
- A judge's finding in granting a stay of proceedings that there was an arguable case that an arbitration clause had been incorporated into parties' contracts is "a finding of mixed fact and law" that "attracts deference" on appeal; the court considered whether the finding was "undermined by a palpable and overriding error": *Sum Trade Corp. v. Agricom International Inc.*, 2018 BCCA 379

Other items of note in B.C.'s new *International Commercial Arbitration Act*

- Imports, with some revisions, Model Law's 2006 provisions on **interim measures**: Part 4.1
- Includes express provision for **security for costs** of arbitration: s. 17(2)(e)
- Clarifies that "[a] party may be **represented** in arbitral proceedings by any person of that party's choice, including, but not limited to, a legal practitioner from another state": s. 21.01
- Provides that "[a]n **arbitrator is not liable** for anything done or omitted in connection with an arbitration unless the act or omission is in bad faith or the arbitrator has engaged in intentional wrongdoing": s. 36.02

Other items of note in B.C.'s new *International Commercial Arbitration Act* (cont'd)

- Addresses **confidentiality**:
  - "Unless otherwise agreed by the parties, the parties and the arbitral tribunal must not disclose any of the following: (a) proceedings, evidence, documents and information in connection with the arbitration that are not otherwise in the public domain; (b) an arbitral award": s. 36.01(2)
  - this provision does not apply "if disclosure is (a) required by law, (b) required to protect or pursue a legal right, including for the purposes of preparing and presenting a claim or defence in the arbitral proceedings or enforcing or challenging an arbitral award, or (c) authorized by a competent court": s. 36.01(3)
  - B.C.'s Attorney General said the provision "will limit disputes regarding the scope of common-law confidentiality as it applies to international commercial arbitration under the *International Commercial Arbitration Act*. This provision will clarify such obligations in advance for the parties."

Other items of note in B.C.'s new *International Commercial Arbitration Act* (cont'd)

- Addresses **third party funding**:
  - section 36(3) now provides that for the purposes of s. 36(1)(b)(ii) (refusing enforcement on public policy grounds), third party funding for an arbitration is not contrary to the public policy in British Columbia
  - B.C.'s Attorney General said that "[t]his type of third-party funding is acceptable in international practice because it enhances the possibility of claimants being able to enforce arbitral rights for which they bargained in international contracts. It's also a common form of risk sharing....The effect of the amendment will be to signal that British Columbia recognizes the use of third-party funding as a commercial practice in international dispute resolution...."


Q&A

Thank You